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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20054

In the Matter of	)	
	)	
Telecommunications Services	)	
Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-260
and Competition Act of 1992:	)	
	)	
Cable Home Wiring	)	

REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

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Dated: March 2, 1998

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REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, hereby submits these Reply Comments on the Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

RCN, through subsidiaries in Massachusetts, New York, Pennsylvania and, in the near future, the Washington D.C. metropolitan area, is a facilities-based provider of video, local and long distance telephone and Internet access services. RCN's interest in this proceeding is

[1] *Report and Order and Second Further Notice of Proposed Rulemaking*, In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment, CS Docket No. 95-184; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, FCC 97-376 (released October 17, 1997) ("Report and Order" or "Second Further Notice").

substantial because RCN's delivery of these services to customers within multiple dwelling unit buildings ("MDUs") is a vital component of its business plans for competing in video and telecommunications markets with incumbent service providers.

RCN urges the Commission to overcome the barriers to competition raised by long-term exclusivity provisions in contracts between MDUs and incumbent multichannel video programming distributors ("MVPDs") by limiting such provisions to a term of five years. This approach would allow the service provider to recover its capital costs of providing service while earning a reasonable profit, but also would enable residents of MDUs to have a choice of providers as quickly as possible. The Commission also must recognize that exclusive MDU contracts are especially inequitable in mandatory access states because such statutes typically benefit only franchised cable operators. The Commission thus should prohibit exclusive MDU contracts in mandatory access states, at least those entered into by the beneficiaries of these laws. Finally, RCN refutes the cable interests' arguments that the Commission lacks authority to regulate exclusive MDU contracts and asks that any procedures adopted for contesting such contracts by quick and simple.

Most importantly, exclusivity provisions in existing and future MDU contracts must be limited in a manner that avoids solidifying the already formidable competitive advantages of franchised cable operators. The worst possible scenario for advancing competition would be one where cable operators are permitted to keep their long-term exclusive contracts while new innovative providers like RCN are denied the ability to enter similar agreements.

I. All Exclusive MDU Contracts Should be Regulated on Equal Terms

RCN agrees with those franchised cable operators and other commenters who endorse the Commission's proposal to subject all MVPDs to the same rules governing contracts for MDU exclusivity.[2] RCN disagrees, however, with those cable interests that nevertheless seek to tip the scales in their favor by urging the Commission to exempt certain types of exclusive MDU contracts from regulation. Specifically, these parties oppose the placement of any restrictions on existing exclusive MDU contracts or on any exclusive MDU contracts in states with mandatory access statutes.[3]

It is not surprising that franchised cable operators favor exempting these categories of exclusive MDU contracts from regulation since they are the primary, if not the only, beneficiaries, of such contracts. With respect to existing, long-term exclusive MDU contracts, the record demonstrates that MDU managers entered into most such contracts at a time before alternatives to traditional cable operators existed.[4] Cable operators used their market power to obtain long-term exclusive access to the MDUs and other favorable terms and conditions,[5] and now urge the Commission to allow these monopolies to continue indefinitely.[6] Moreover, commenting cable interests apparently do not object to a restriction on future exclusive MDU contracts,[7] the result of which of course would further solidify their competitive advantage.

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[2] *See, e.g.*, U S West Comments at 7-8; Time Warner Comments at 12-13; NCTA Comments at 5-6; Cox Comments at 10.

[3] *See, e.g.*, CableVision, et. al. Comments at 6; Time Warner Comments at 4; NCTA Comments at 2.

[4] OpTel Comments at 2.

[5] DirecTV Comments at 3.

[6] CableVision, et al. Comments at 6.

[7] Cox Comments at 4; NCTA Comments at 2; Time Warner Comments at 13.

Similarly, only a franchised cable company can enforce an exclusive MDU agreement in a state with a mandatory access statute, since almost all such statutes benefit only franchised cable operators, notwithstanding U S West's assertions to the contrary.[8] Cable operators often employ such laws to nullify the effect of a contract by a competing service provider for access to an MDU. Of course, a competing provider faced with the same situation has no similar recourse against the incumbent franchised cable operator.

If the regulation of exclusive MDU contracts is going to effectively promote consumer choice of video programming services, then special exemptions cannot be carved out for franchised cable operators. Special exemptions will only further skew the marketplace in favor of franchised cable operators at the expense of new market entrants such as RCN. Clearly the Commission does not intend such an anti-competitive and absurd result.

As stated in RCN's initial Comments, parity among MVPDs is the key to achieving the purpose of promoting competition. Thus, exclusivity provisions in both existing and future MDU contracts should be regulated on equal terms, and equality should be brought to mandatory access states by eliminating exclusive MDU contracts for franchised cable operators in mandatory access states.[9] The worst possible scenario for enhancing competition would be one where franchised cable operators are allowed to keep their long-term exclusive contracts while innovative entrants like RCN are denied the ability to enter similar agreements, or where cable operators can continue to use mandatory access statutes to protect their monopolies.

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[8] U S West Comments at 5.

[9] In the alternative, the mandatory access laws themselves should be preempted and nullified so that both franchised and alternative MVPDs can enter into exclusive MDU contracts in such jurisdictions subject to the Commissions regulation.

II. The Commission Possesses The Authority to Regulate Exclusive MDU Contracts.

RCN disagrees with the commenters who suggest the Commission lacks the statutory authority to regulate existing and future exclusive MDU contracts.[10] As explained in RCN's initial Comments, the Commission's authority to restrict exclusivity may be found under Sections 4(i) and 303(r) of the Communications Act, in conjunction with the broad regulatory authority invested in the Commission under Title VI of the Communications Act.[11] The Commission correctly relied upon this statutory authority to establish its procedures governing the transfer of inside wiring among MVPDs and could take a similar tack here to regulate exclusive MDU contracts.[12]

In the alternative, the Commission could rely on Section 628(b) of the Communications Act, which provides in pertinent part, that "[i]t shall be unlawful for a cable operator . . . to engage in unfair methods of competition or unfair . . . acts or practices the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[13] The Commission previously has determined that:

> "[W]hile Section 628(b) does not specify types of 'unfair' practices that are prohibited, it 'is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming.'"[14]

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[10] *See, e.g.*, NCTA Comments at 2-5; GTE Comments at 4-9.

[11] RCN Comments at 14; *see also* Ameritech Comments at 9.

[12] *Report and Order* at ¶¶ 83-101.

[13] 47 U.S.C. § 548(b).

[14] *Memorandum Opinion and Order on Reconsideration of the First Report and Order*, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of

The Commission thus may regulate any contract of any cable operator that unfairly inhibits the ability of MDU residents to receive video programming from a competing MVPD. Pursuant to Section 628(b), the Commission can and should adopt a presumption that exclusivity contract provisions that exceed five years are unfair and should place the burden of demonstrating the fairness of such a provision upon the MVPD who claims the benefit of the provision. This approach has worked well in eliminating exclusive contracts among programming vendors and cable operators and would work similarly in the context of exclusive MDU contracts.

Finally, Section 207 of the Telecommunications Act of 1996[15] gives the Commission authority to regulate private contracts that interfere with the ability of MDU residents to receive television services using technologies that compete with franchised cable operators.[16] The Commission already has employed its statutory authority under Section 207 to invalidate provisions in private covenants and contracts that prevent the MDU residents from receiving video programming via over-the-air reception antennas, and has determined that invalidating those contract provisions is constitutional.[17]

1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, 10 FCC Rcd 3105, 3126-27 (1994) *citing Report and Order*, In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd 3359, 3374 (1993).

[15] Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 114, *codified at* 47 U.S.C. § 303.

[16] *See Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations, Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service, 11 FCC Rcd 19276 (1996) ("*OTARD Order*").

[17] *OTARD Order* at ¶ 45.

For purposes of the Commission's authority, an exclusivity provision in an MVPD's contract to serve an MDU is no different than a restrictive covenant that prevents an MDU resident from receiving video programming via an over-the-air antenna from that same cable competitor. Both provisions are contractual arrangements by MDU owners or managers that restrict the choice of MDU residents to receive video programming from competing technologies; thus, both can be regulated pursuant to Section 207.[18]

III. The Procedures For Contesting Exclusive MDU Contracts Should Be Simple.

Certain cable commenters propose procedures for contesting exclusive MDU contracts that are onerous and designed to give the incumbent franchised cable operator every procedural advantage.[19] Any procedures adopted by the Commission that aim to permit the fair resolution of a dispute concerning exclusive MDU contracts must be prompt and simple, regardless of the forum. There should be no pre-conditions that could serve to impede one's ability to contest the validity of an exclusive MDU contract and the burden of proof should always be on the proponent of the exclusive MDU contract.

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[18] In addition, since a limitation on exclusivity does not compel the physical use of property, no takings issue is involved. See *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971), where the Court stated that the "property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests." *Id.* at 863-64.

[19] *See, e.g.*, CableVision et. al Comments at 6-9.

CONCLUSION

For the foregoing reasons, the Commission should undertake to bring the benefits of competition to MDU residents by ensuring that parity is attained among MVPDs with respect to their access to MDUs. Specifically, the Commission must avoid adopting the cable interests' proposal that existing exclusivity provisions in MDU contracts be preserved while future exclusive contracts are prohibited. Such a result would seriously hinder the business growth of innovative competitors like RCN that are attempting to produce the results intended under the Telecommunications Act of 1996.

Respectfully submitted,

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